SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S BRIEF.

R. K. WISE,
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Counsel for Petitioner.

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Opinions Below.

The opinion of the District Court at the time motion for new trial was overruled, is set forth on pages 44 and 45 of the record.

The opinion of the Circuit Court of Appeals (R. 51-58) is reported in 116 F. (2d) 812.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 58). Petition for rehearing was filed February 7, 1941 (R. 59-64), and was denied March 10, 1941. The petition for a writ of certiorari was filed May 22, 1941, and granted October 13, 1941.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner-appellee totally and permanently disabled, testimony which the jury apparently believed, thus usurping the functions of the jury by invading their province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to find a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

Provisions of Constitution, Statutes and Court Rule Involved.

The Seventh Amendment to the Federal Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C., Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

Title 38, U. S. C. A., Supp. Section 445 provides:

"In the event of disagreements as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

The Act of June 19, 1934, c. 651, paragraphs 1, 2; 48 Stat. 1064, 28 U. S. C., paragraphs 723 b, 723 c, provides:

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by the general rules, for the district courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. *Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*

Sec. 2. The Court may at any time write the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate.* * * * (Italics supplied.)

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the

evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, *a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;* or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics supplied.)

Statement.

The petitioner, plaintiff-appellee below, recovered judgment against the respondent in the District Court of the United States for the Western District of South Carolina, on the verdict of a jury (R. 45), for total permanent disability benefits under a contract of yearly renewable war risk term insurance, judgment being entered by the District Court for the sum of $57.50 per month in petitioner's favor beginning April 2, 1919.

At the conclusion of the evidence, respondent-appellant moved for a directed verdict.

Respondent-appellant appealed, presenting the question of whether there was substantial evidence that the insured became totally and permanently disabled, and whether the trial court erred in excluding evidence and in charging the jury.

The United States Circuit Court of Appeals for the Fourth Circuit, in the decision now sought to be reviewed (R. 51-58) which is reported in 116 F. (2d) at page 812, held that there was no substantial evidence to prove that the insured was totally and permanently disabled. Having so decided, the Court of Appeals reversed and remanded the cause, not for a new trial, *but with direction to enter judgment in favor of the United States, respondent appellant, although no motion for a judgment despite the verdict had been made*, nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by a motion for a directed verdict.

BRIEF OF ARGUMENT.

Point I.

THERE WAS AMPLE EVIDENCE TO SUPPORT THE VERDICT OF THE JURY THAT PETITIONER WAS TOTALLY AND PERMANENTLY DISABLED.

Point II.

ASSUMING (WITHOUT ADMITTING) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN REVERSING THE ACTION OF THE TRIAL COURT, STILL ITS ACTION IN REMANDING THIS CASE TO THE DISTRICT COURT WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THE UNITED STATES WAS ERRONEOUS.

Argument.

Point I.

There was ample evidence to support the verdict of the jury that petitioner was totally and permanently disabled.

The only law questions here presented for consideration are the rulings of the Circuit Court of Appeals (1) that "there was no substantial evidence to prove that the insured was totally and permanently disabled when his insurance was in force (R. 51)," and (2) in remanding this case to the District Court with instructions to enter judgment in favor of the United States. Although the Circuit Court of Appeals (R. 55) commented upon the ruling of the District Judge upon the admissibility of evidence, such remarks by the court below were purely dicta, as the opinion indicates it was unnecessary to consider the correctness of such rulings on the evidence by the District Judge. Hence, that question is not now before this Court.

Plaintiff has been deprived of a *substantive right* by the erroneous action of the court below, to wit, his right to a trial by jury.

The Act of June 19, 1934, 49 Stat. 1064, 28 U. S. C. paragraph 723 (b) and 723 (c), which empowered this Court to prescribe general rules regarding procedure in said courts, also provides: "*Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*

"Sec. 2. The court may at any time write the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however, that in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate* • • •."

Plaintiff's right to a jury trial, even if the action of the trial court in reversing the judgment should be held by this Court to be correct (which we do not concede) was a *substantive right*. The new rules of civil procedure do not affect any *substantive rights* of a litigant, and hence do not affect petitioner's right to a jury trial. (Act of June 19, 1934, c. 651, sec. 1, 48 Stat. 1064.)

In the absence of any Federal statute authorizing the Circuit Court of Appeals to act as it did here, such action was without sanction or authority of law, and therefore void.

The right of the Circuit Court of Appeals to remand this case with direction to dismiss without another trial, is not authorized by the Federal Rules of Civil Procedure, for the reason that there was no compliance with the only provision of the rules that could possibly have authorized this action; to wit, no motion was made by the defendant *non obstante veredicto*.

Before examining the evidence in this case, the court's attention is invited to the pertinent comment of the District Judge who had ample opportunity to observe the witnesses, as appears in the record. When he charged the jury he said (R. 39):

> "Dr. Land said in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention."

The order of the District Court overruling defendant's motion for a new trial (R. 44-45) which was doubtless prepared by the District Judge after ample opportunity for reflection and deliberation states:

> "I am of the opinion that there was ample evidence to go to the jury in this case. The Government records showed that the veteran was not in good physical condition when he was discharged from the Army. He was given vocational training at Waynesville, N. C., and at the University of Georgia, but the testimony was and the record showed that his training was frequently interrupted on account of his physical and mental condition. The veteran's wife who is his committee, and who was a school teacher prior to their marriage in 1921, made a very impressive witness. She testified that the veteran was in bad physical condition and extremely nervous even before their marriage in 1921; (fol. 75) that soon after their marriage she discovered that the veteran was mentally unbalanced, that he was suspicious of her and all the neighbors, was afraid that someone would poison him, and he threatened to kill her and all of the children and commit suicide. Several of the neighbors testified that the veteran appeared to be sick, was very contentious and suspicious, and was on bad terms with all of his neighbors."

Dr. J. N. Land testified that he had known the veteran since he was a boy; that he had been the physician of his mother's family before the War and had seen the veteran quite regularly since he returned from the Army; that he had considered him both physically and mentally unfit for work since his discharge; and that any sustained effort would, in his opinion, have brought about a complete collapse of the veteran physically and mentally.

The Government offered little testimony to offset the plaintiff's case other than the testimony of Dr. C. H. Young, who examined and passed the veteran for a life insurance policy. But, on cross-examination, Dr. Young admitted that he had made no mental examination of the veteran and that in such an examination as he made it would not be unusual for him to overlook the veteran's mental condition, (fol. 76) and that one might easily conceal the fact that he was mentally deranged on such an examination. The Agent who represented the insurance company for which Dr. Young had made the examination testified that a substandard policy was issued to the veteran and that it was not accepted by him.

I am of the opinion that the jury returned a proper verdict in this case and I am convinced that if a new trial were granted, another jury would come to the same conclusion.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled as found by the jury the question was for the jury. Here facts were in dispute which were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

It is significant that the court below at no place in its opinion reciting the facts upon which it found the evidence to be insubstantial referred to the fundamental rule that in determining a motion for a directed verdict the court

must assume that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and all the inferences fairly deducible from the facts should be drawn in favor of the opposing party. See *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. R.* v. *Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 606; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663.

Abundant substantial evidence, medical and lay testimony and record evidence appears in this record. Plaintiff introduced one physician and seven lay witnesses. Defendant introduced one physician and but one lay witness. Government records showing plaintiff's nervous condition prior to his discharge from the Army and reports of medical examiners and hospital records after his discharge from the Army were introduced.

Dr. J. N. Land, who knew the insured practically all his life (R. 22), described his mental condition as psychoneurosis and said he was a hypochondriac. The witness testified (R. 22-23):

> "He is the talking type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. *I would not have advised him to do any work since he has been out of the army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically.*" (Italics supplied.)

This evidence is substantial and shows that the insured was unable to work without it being harmful to him. This

Court in the *Lumbra* case, 290 U. S. 551 (at page 560) stated:

> "The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. *He may have worked when really unable and at the risk of endangering his health or life.*" (Italics supplied.)

This Court in the *Lumbra* case cited favorably the following cases:

United States v. *Phillips* (C. C. A. 8) 44 F. (2d) 689, 691;
United States v. *Godfrey* (C. C. A. 1) 47 F. (2d) 126;
Carter v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223;
United States v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651;
Nicolay v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173.

Here every element which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

The Court properly charged the jury (R. 39):

> "• • • *whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him, 'If you do that, it is going to seriously impair your body or mind.' I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention.*" • • • (Italics supplied.)

The Circuit Court of Appeals, in commenting upon this testimony of Dr. Land (R. 52) stated that it had little probative force, basing its opinion, among other things, on the fact that the doctor did not make a *physical* examination of the insured until about six years before trial. However, this suit is based upon a *mental* condition.

Even though the testimony might have but "little" probative force when weighed by the court below, yet its "probative force" was for the *jury* to determine and not for the Circuit Court of Appeals to weigh, as it did here. In doing so, it usurped the function of the jury.

The court below was apparently largely influenced by the fact that the plaintiff had only one medical witness (R. 52). It was apparently proceeding upon the assumption that in order for an insane insured to recover total and permanent disability benefits he must produce considerable expert medical testimony. In this, its action was contrary to the opinion of this Court in the Case of *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. Ed. 538, where this Court stated:

> "Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds some support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which

all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. * * * The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached."

Doctor Land testified (R. 23):

"He is not physically in good shape, and is mentally in bad shape. *When he got out of the Army I didn't hold any hope for his recovery*, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

"The report of February, 1921 shows hypochondriasis, that is, a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with this man he has dwelled (R. 23) on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike. * * *" (Italics supplied.)

(R. 25) "I thought he was a crazy man. * * * I know I tried to get him in (R. 26) the Columbia Hospital and they refused to take him. That was in 1937. * * *"

(R. 26) "My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

"Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would recover. Has that been verified by the fact that he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir. * * *"

The trial court, who had the opportunity to observe the witnesses (a privilege which the court below did not enjoy), in commenting on the insured's wife's testimony, said (R. 44):

> "*The veteran's wife* * * * *made a very impressive witness.*"

The insured's wife, who first met him in 1913, testified (R. 5):

> * * * "We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia, and stayed for about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work in 1924.
>
> "(R. 5) With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. *That has continued to be true up to the present time.* He could not work all day. He worked maybe an hour or two. * * *" (Italics supplied.)

This testimony coming from a person who had an opportunity continuously to observe the insured shows that working actually was harmful to him. The court below did not draw proper inferences from this testimony. The weight to be accorded this testimony was for the jury to pass upon, and undoubtedly it believed this witness and accorded her testimony and that of Dr. Land due weight.

The insured's wife further testified (R. 5):

"* * * With reference to his mental condition, he was suspicious of everybody. That has been true since his discharge from service. He is suspicious of his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, *he says he would rather die than go there.* He (R. 5) has been in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen. * * *"

* * * * * * *

"Q. His this condition improved any since you were married?

"A. None whatever.

"Q. Is it any worse?

"A. Well, he is harder to control now than he was at first."

The jury was justified in believing from the foregoing testimony that the insured's condition had not improved from April 16, 1921 when he was married until the date of the trial; and if his condition did not change in this period of time it was justified in concluding that it was reasonably certain that it would continue throughout the remainder of his life.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267, U. S. 608):

"As permanency of any condition (here, total disability) involves the element of time, the event of its

> continuance during the passage of time is competent and cogent evidence."

This was a proper inference to be deduced from the foregoing testimony, but the Court of Appeals did not take this view of the evidence, favorable to the insured.

The Court of Appeals apparently penalizes the insured because his wife did not send him to a mental hospital. This is not only failing to give the evidence here all the proper inferences as required by decision of this Court in *Gunning* v. *Cooley*, 281 U. S. 90, but penalizes this mentally incompetent insured because of something his wife did not do which apparently the Circuit Court of Appeals felt she should have done.

It is common knowledge that many persons abhor being patients in hospitals. Particularly is this true of a person suffering from mental ailments as was this insured; and particularly did he loathe the hospital at Augusta, Georgia. Persons with mental impairments are not held to the strictest rule of human conduct under the law, but notwithstanding this, the court below held this crazy man to the same degree of care that it would impute to a sane man.

The court below apparently takes the position that it was incumbent upon the insured to secure adequate hospitalization, notwithstanding evidence of record here from Doctor Land that he tried to get him in the government hospital in Columbia but the government would not take him (R. 26). In this connection Doctor Land testified (R. 25):

> "* * * I thought he was a crazy man (R. 25). * * * I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia and they discharged him from the hospital in Roanoke as mentally competent, yet they wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was

> mentally competent when he was discharged from Roanoke, they wouldn't take him in Columbia for intestinal trouble and wanted to send him to Augusta. I asked that question and they never answered it. * * *" (R. 25) Hospitals have not always been available.

The Circuit Court of Appeals gave to the facts in this case a much less favorable view than the evidence warranted on the question of hospitalization. It apparently overlooked entirely the above quoted testimony of Doctor Land in this regard, the apathy of the insured to hospitals, the fact that one suffering from a mental condition would rather be around their loved ones than behind the bars of a government insane asylum, and the fact that his own physician could not get the government to hospitalize him; and in addition the Circuit Court of Appeals placed upon this mentally incompetent disabled World War Veteran the burden of knowing what was best for him and erroneously penalized him for the failure of his wife to send him to an insane asylum against his wishes although she thought it would be a good thing. The Circuit Court of Appeals, in placing this construction upon this testimony, overlooked the human element which doubtless appealed to this jury, who doubtless gave weight to this testimony, based upon their experience in life. This petitioner was denied by the Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this Court in *Gunning* v. *Cooley*, *supra*.

Particularly is it significant in the instant case that the United States produced no witness to contradict the testimony of Doctor Land or any one of petitioner's seven lay witnesses. Defendant's only medical witness, Doctor

Young, testified (R. 33) that no mental examination was made by him of the insured and admitted that it was not unusual to examine a person physically and overlook the (R. 33) "mental side" and that very often the patient can conceal the fact of mental abnormality from the physician who makes a physical examination.

The court below cites the case of *Mikell* v. *United States*, 64 F. (2d) 301, a case of chronic *appendicitis*; *United States* v. *Ennis*, 73 F. (2d) 310, a case of *tuberculosis*; *United States* v. *Marsh*, 107 F. (2d) 173, a case involving *appendicitis* and *adhesions*; *Neely* v. *United States*, 115 F. (2d) 448, a case involving *arrested tuberculosis*, as authority for the proposition that the conduct of this insured, who is *insane*, is governed by the same rules as the conduct of a sane person. None of the cases cited by the court below involve an *insane man* as authority for the proposition that this insane veteran should be charged with the failure of the government to adequately hospitalize him. This portion of the decision of the court below is contrary to the reasoning in the decision of the Fifth Circuit in the case of *Gilmore* v. *United States*, 93 F. (2d) 774, where that court at page 777 stated:

> * * * "but an inference drawn by a process of probable reasoning from the conduct of an ordinarily prudent person does not rationally follow from the same conduct of one who is insane * * *."

In the case of *Cox* v. *United States*, 24 F. (2d) 944, which was a case involving the war risk insurance contract of a mentally incompetent person, the Fifth Circuit Court of Appeals stated:

> "As an interdict he was incapable of entering into a legal contract of employment, and it is reasonably certain that he could not have secured employment from any but a friend who would put up with his idiosyn-

crasies. Ability to continuously follow a substantial, gainful occupation implies *ability to compete with men of sound mind and average attainments under the usual conditions of life.* Argument is not needed to demonstrate that one who has been officially declared insane and has exhibited the vagaries that Cox did could not successfully so compete, although he might have lucid intervals in which he could render satisfactory service. This conclusion finds support in the reasoning of the court in the following cases: Starnes *v.* U. S. (D. C.), 13 F. (2d) 212; Jogodnigg *v.* U. S. (D. C.), 295 Fed. 916; Forbes, Dir., *v.* Welch (App. D. C.), 286 Fed. 866." (Italics supplied.)

The fact that this insured had a committee has evidentiary bearing upon the question of his total and permanent disability. (*Forbes* v. *Welch*, 286 F. (2d) 765.)

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> * * * "His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of coordination between his mind and his body, and as said by us in Asher *v.* United States (C. C. A. 8) 63 F. (2d) 20, 23:
>
> "'True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. * * *'"

In the case of *Jagodnigg* v. *United States*, 295 Fed. 916, a war risk insurance case in which the court held the insured to be permanently and totally disabled, after reciting the definition of total and permanent disability said:

> "This certainly does not mean that the requirements 'to follow continuously any substantially gainful occupation' shall be satisfied by the performance of some negligible duties under supervision and direction of a guardian or caretaker. What is meant is clearly the

ability of the soldier to earn substantially through *independent effort*. This young man has physical strength, but he is less than a child in mind. He has been judicially held to be capable of handling his affairs. He is under guardianship, * * *."

The facts in this case are much stronger from petitioner's standpoint than those in the case of *Berry* v. *United States*, 85 L. Ed. 576, where this Court held:

"* * * It was not necessary that petitioner be bedridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled. * * *" (*Citing Lumbra* v. *United States*, 290 U. S. 551.)

"It cannot be doubted that if *petitioner had refrained from trying to do any work at all*, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies" (citing *United States* v. *Rice*, 72 F. (2d) 676; *Nicolay* v. *United States*, 51 F. (2d) 170, 173; *United States* v. *Lawson*, 50 F. (2d) 646, 651; *United States* v. *Godfrey*, 47 F. (2d) 126, 127; *United States* v. *Phillips*, 44 F. (2d) 689, 691).

It is significant that in the instant case appellant produced no witness to contradict the evidence of Doctor Land or anyone of appellee's seven lay witnesses. Doctor Young, the only medical witness called by appellant, testified (R. 45):

"* * * A mental examination was not made at all." * * *

He further testified:

> "* * * You cannot always determine from talking to a man on the first examination whether he is mentally all right. It requires more than that, yes, sir.
>
> "It is not unusual to examine a man physically and to overlook the mental side, that is quite right. Very often, even over a long period of observation the patient can conceal the fact that there is abnormality so far as mental condition is concerned. * * *"

The official records of the War Department show (R. 27) that on September 7, 1918, the insured was *very nervous*, his spine was very tender, and the processes of a vertebrae seemed to be out of line. He gave the impression of having neurasthenia (R. 28). He was inducted into the service June 24, 1918, was sent to Camp Jackson, South Carolina, sailed for France, August 27, 1918, and on September 22, 1918, he hurt his back, was sent to Camp Hospital No. 33 and placed in a plaster of Paris jacket. He had vomiting spells, was transferred to Base Hospital No. 65 a few weeks later, and then returned to the United States.

The records further show that while in the government hospital (R. 28), "is *nervous*, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times. Hyperacidity in stomach. *Looks nervous*, but not particularly sick." (Italics supplied.)

Various examination reports showed nervousness and diagnoses of psychoneurosis, neurasthenic type (R. 20), and psychosis, neurasthenic type, was made. The last diagnosis (R. 20) showed neurasthenia. Clearly, he did not improve.

Crymes W. Halliday, the insured's brother, testified (R. 26-27):

> "I am a brother of the plaintiff. Prior to our entry into the Army we both worked at the Anderson Brothers Dry Goods Store and were paid $100.00 a month or $25.00 a week. When they moved the firm to Green-

wood from Anderson, my brother got $150.00 a month. When I first saw my brother after his return from the Army, his condition physically and mentally was practically the same as it is today. I would say he was a complete physical and mental wreck, very badly torn up physically and mentally."

Upon the insured's discharge from the service (R. 17) he was altogether a different man. When he tried to work he appeared to have no strength. When he returned from the Army (R. 16) he did not have a grip upon himself because of nervousness, and lacked control of himself.

Henry Jackson, a cotton buyer, testified that before the insured entered the Army, he was strong and in good shape (R. 15); but for the last several years he has been in a highly nervous state, and appeared in pretty bad shape from a nervous standpoint.

Doctor Land testified (R. 24):

"Neurosis is nervousness and psychoneurosis is a disease in which the brain is unbalanced to the point that they imagine almost anything."

"Q. Imagines he was sick?"

"A. Imagines he was sick."

It seems unreasonable that a country boy who before going into the service was a successful clerk in a store who made $100.00 a month and then was promoted to $150.00 a month would return to his home from the service and refuse to do any work or attempt to follow a gainful occupation unless he was mentally unable to do so. It is not uncommon for a man who is *physically* disabled to continue working until death overtakes him, but when a person who is *mentally* disabled and thinks he is sick at all times and that everyone in the community is against him and is suspicious of people doing things to him, this type of man cannot work even though efforts are made to force him. This is the picture of this veteran, James H. Halliday.

POINT II.

Assuming (without admitting) the Circuit Court of Appeals was correct in reversing the action of the trial court, still its action in remanding this case to the District Court with directions to enter judgment in favor of the United States was erroneous.

In the cases of *Conway* v. *O'Brien*, No. 344, October Term, 1940 (85 L. Ed., Adv. 575) and *Berry* v. *United States*, No. 336, October Term, 1940 (85 L. Ed., Adv. 576), where the lower court's construction of Rule 50 (b) of the Rules of Civil Procedure was involved the same two questions presented in the instant case were involved, to-wit, the question of substantial evidence and the construction placed upon Rule 50 (b) by the Circuit Court of Appeals in those two cases. However, this Court did not pass upon Rule 50 (b), holding that the facts were sufficient in each of those cases to justify their submission to the jury. We believe that this case should be acted upon in the same manner that this Court followed in those two cases because the record here indicates evidence from which the jury properly reached the construction that petitioner was totally and permanently disabled.

However, if this Court should be of the opinion that the District Court incorrectly appraised the law and facts (which petitioner in nowise concedes), then the action of the Circuit Court of Appeals in this case in remanding to the District Court with instructions to enter judgment in favor of the United States should be reversed as it was erroneous.

The order of the Circuit Court of Appeals for the entry of judgment contrary to the verdict deprives petitioner of his right of trial by jury, contrary to the 7th Amendment to the Constitution, which provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The facts which the court below found could have been

found by the jury on the testimony. It certainly can not be said, however, that the facts which the court found were those most favorable to the plaintiff which could be founded upon the testimony. It has been the long settled law that the verdict of a jury is not to be directed, or upset, unless the latter is true.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version different from that which it may be fairly assumed the jury believed. The facts are stated herein in detail under Point I.

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted (R. 57).

The court below recognizes in its opinion that it was entering judgment notwithstanding the fact that its action was contrary to the expressed provision of Rule 50 (b). It stated (R. 57):

> "* * * We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of Baltimore & Carolina Line *v.* Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as

> he is permitted under Rule 50 b) in the lower court a motion, after the verdict, 'to have judgment entered in accordance with his motion for a directed verdict.' "

The learned court cites in support of its position certain decisions which however are not controlling as will be more fully discussed in the brief filed in support hereof. One of the decisions cited by the court below as its authority for the action taken here was the case of *Conway* v. *O'Brien*, Second Circuit, 111 F. (2d) 611. However, as previously stated, this Court did not pass upon this question in the *Conway* case.

In the case of *Berry* v. *United States*, No. 366, October Term, 1940, 85 L. Ed. (Advance Sheets, page 576) this Court, in its opinion of March 3, 1941, recognized the fact that the Circuit Courts of Appeal are not in complete agreement upon the question here presented, yet this Court in the *Berry* case held that there was no occasion to decide the question here presented because this Court held that in that case the Circuit Court of Appeals erred as there was evidence from which a jury could reach the conclusion that the insured was totally and permanently disabled.

In the *Berry* case, this Court stated:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In this Court's opinion in the *Berry* case it mentioned the decision of the court below in the instant case in its footnote No. 3 when it made the statement that the Circuit

Courts of Appeal are not in agreement upon this important question of law.

It is believed that the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140, correctly states the applicable law and should be followed by this Court. In that case Circuit Judge Sibley held, at page 143:

> "It follows that the judgment for the defendant notwithstanding the verdict ought not to have been entered and must be reversed. Appellants thereupon contend that we should order a judgment entered on the verdict, as was done in *Duncan* v. *Montgomery Ward & Co.*, 8 Cir., 108 F. (2d) 848, 853. That, we think, would be a misapplication of Rule of Civil Procedure 50 (b). The rule provides for a motion within ten days after verdict to set the verdict aside and for judgment on a motion for directed verdict made in the trial, and adds: 'A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.' An alternative motion for new trial was made in this case. If the judge had refused the judgment on directed verdict for defendant primarily asked, as we have held he should have done, he should then have considered the motion for new trial. According to all the federal cases he has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. In this case a new trial might be granted either because the judge thought the jury went wrong in not finding that the fall of the building preceded the fire in the merchandise, or because he thought the amount of the fire loss found was not justified. When we reverse the grant of judgment as on a directed verdict, the cause should be remitted to the district judge that he may pass on the motion for new trial. Cases may occur in which the trial judge may think his charge, or rulings on evidence, or other occurrences in the trial require a new trial. Rule 50 ought not to be so construed as to cut

> off his supervisory power over the verdict because he erred in giving judgment notwithstanding the verdict. To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. Rule 59 (d)."

If the decision of the Circuit Court of Appeals is correct in remanding this case with instructions to the District Court to dismiss it without a new trial, then the purpose of Rule 50(b) can be defeated by trial counsel ignoring the plain express provisions of the rule requiring a motion *non obstante veredicto* to be made. By the simple operation of ignoring the necessary requirement of the rule to make such motion, trial counsel, by not complying with the requirements of Rule 50(b) can pass on to the Circuit Courts of Appeal the duties which this rule contemplates the District Judge should perform and thus prolong litigation, increase the burden of the Circuit Courts of Appeal and in effect defeat the purpose of the Rules of Civil Procedure.

It is not believed that this result is either desirable, necessary, or required. We do not believe that it was ever contemplated that trial counsel, by the simple expedient of neglecting to follow the requirements of Rule 50(b), should be permitted to deprive his adversary's client, in this manner, of the right to a new trial in circumstances such as exist here.

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury, but the point must by some appropriate means be submitted to the trial judge after verdict and be by the

trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50(b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the issue of total and permanent disability, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court made.

New Federal Rule 50(b) makes universally possible in Federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Inc. Co.*, 228 U. S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a Federal rule. He discusses the manner by which sufficiencies of evidence have been challenged

in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a judgment *non obstante veredicto*, a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance [illegible] the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and a new trial, unless means are taken to bring the matter into the record for disposition by the judge after trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate Court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

The Federal Rule 50(b) is merely an instrumentality to accomplish the reform which had been local to the States,

notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line* v. *Redman*, *supra*, 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's opportunity for consideration of the sufficiency of the evidence was as good and unhurried before the rule as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

This Court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 392, 394, 395. The point appears from the following from this Court's opinion:

"The court refused to direct for plaintiff or defendant and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."

* * * * * * *

"The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying they found nothing in Rule 50(b) to restrict its power to direct entry of judgment.

The court below found nothing in Rule 50(b) that restricts their power to direct the entry of judgment by the

lower court in favor of the defendant rather than to order the granting of a new trial. The court below further states that defendant was *permitted* under Rule 50(b) to file a motion after verdict. The court's position in this regard is believed to be erroneous because as we view the rule the defendant was *required* to file a motion after verdict in order to justify the action taken by the Circuit Court of Appeals here.

The action of the court below is directly contrary to the holding of the decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, with which case this Court is familiar. This action in remanding the case with instructions to direct a verdict was grounded (R. 56) upon the following cases:

Conway v. *OBrien* (2 Cir.), 111 F. (2d) 611, 613;
Eastern Livestock Cooperative Marketing Ass'n., Inc., v. *Dickenson* (4 Cir.), 107 F. (2d) 116, 120;
Lowden v. *Denton* (8 Cir.), 110 F. (2d) 274, 278.

The decision of the court below is unsound because it is grounded upon false premises that the above cases supported its decision.

The decision of the Second Circuit in the case of *Conway* v. *O'Brien* is grounded upon the case of *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, and *Massachusetts Protective Association* v. *Mouber* (8 Cir.), 110 F. (2d) 203, in both of which cases motions for verdict *non obstante veredicto* were made. Therefore these decisions are no basis for the action taken by the Second Circuit in the *Conway* case.

The decision of the Circuit Court is based in part upon the *Conway* case. Therefore if the *Conway* case is grounded upon cases which do not support its decision, it follows necessarily that it must fall, and therefore that part of the instant decision of the court below using the *Conway* case as a basis must likewise fall.

In the case of *Eastern Livestock Corp.* v. *Dickenson*, 107 F. (2d) 116, cited by the court below, a motion was made in the trial court to set aside the verdict.

In the case of *Lowden* v. *Denton*, 110 F. (2d) 274, relied upon by the court below, a motion was made to set aside the verdict in that case after judgment in accordance with the motion for directed verdict at the close of the evidence. The record of the Circuit Court of Appeals became the record of the United States Supreme Court and such record was filed in this Court May 17, 1940. See pages 11-13 of that record.

In *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8), the Circuit Court of Appeals said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule" (50 b) "of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

In *Brunet* v. *S. S. Kresge Co.* (C. C. A. 7, decided Nov. 20, 1940), cited by the court below in support of his opinion, a motion *non obstante veredicto* was made.

Also, in *Willis* v. *Pennsylvania Railroad Co.*, 35 Fed. Supp. 941, there was a subsequent motion after verdict.

In the case of *Montgomery Ward* v. *Duncan*, decided December 9, 1940, by this Court, the question here involved was not there presented, that case merely holding that motions for new trial were for the trial courts. This decision has nothing to do with the questions here involved.

In the case of *Demers* v. *Railway Express Agency*, 108 F. (2d) 107, a motion was filed after verdict.

The reasoning of the Circuit Court of Appeals is grounded upon the cases of *Conway* v. *O'Brien*, *supra*, *Eastern Livestock Cooperative Marketing Ass'n, Inc.*, v. *Dickenson*, *supra*, and *Lowden* v. *Denton*, *supra*. These three cases

are clearly distinguished from the situation prevailing in the instant case as just pointed out. Therefore, applying the logic invoked by this Court that "when the root is cut the branches fall" (*Hallowell* v. *Commons*, 239 U. S. 506; *White* v. *United States*, 270 U. S. 175; and *Smallwood* v. *Gallardo*, 275 U. S. 56, 62), so too must the decision of the court below succumb.

The following cases indicate a view contrary to that of the court below:

Ferro Concrete Const. Co. v. *United States*, 112 F. (2d) 288, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

In *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 240, C. C. A. 8, the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Ass'n *v.* Mouber, 8 Cir., 110 F. (2d) 203; Lowden *v.* Denton, 8 Cir., 110 F. (2d) 274."

Conclusion.

It is respectfully submitted that for the reasons stated herein the judgment of the Circuit Court of Appeals holding that the lower court should have directed a verdict in favor of the United States on the ground that there was not substantial evidence of total and permanent disability should be reversed; and in any event the judgment of the Circuit Court of Appeals remanding this case to the Dis-

trict Court with directions to enter judgment in favor of the United States should be reversed.

Respectfully submitted,

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